year period thereafter, does not affect a BOC's provision of interLATA services that have already been authorized by the MFJ court. All previously granted waivers and authorizations by the MFJ court thus continue in effect indefinitely and the BOC may continue activities under the terms and conditions authorized by the MFJ court "at any time"—including after the first anniversary of the 1996 Act's enactment. The only meaning that this could have is that the restrictions and prohibitions contained in the 1996 Act that would otherwise apply are inapplicable henceforth to all previously authorized activity. This interpretation is confirmed by Section 272(a)(2)(B)(iii), which provides that a separate affiliate is required for the origination of interLATA services, with the exception (among others) of "previously authorized activities described in section 271(f)." Accordingly, BellSouth submits that Congress *did* expressly intend to "grant a permanent exemption for previously authorized activities from the separate affiliate requirements of section 272."[43]

Similarly, with respect to manufacturing and interLATA information services, the plain import of Section 271(f) is to grandfather permanently all manufacturing activities previously authorized by the MFJ court. The legislative history indicates that all waivers previously granted by the MFJ court are "grandfather[ed]" by this section, and that it "cover[s] both interLATA services and manufacturing."[44] By using the term "interLATA services" the legislative history makes clear that interLATA *information* services authorized by the MFJ court are to be grandfathered, as well as interLATA *telecommunications* services that were authorized by the court.[45]

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43 *See NPRM* at ¶ 38.

44 Conference Report at 149.

45 The statute defines information service and telecommunications service separately from interLATA service. All three involve the offering of telecommunications; an interLATA service involves telecommunications across a LATA boundary. *See* 47 U.S.C. § 153. Thus, interLATA information service is a subset of interLATA service. See the discussion in the following Section.

B. InterLATA Information Services (*NPRM* ¶¶ 41-50, 54)

The Commission premises its discussion of interLATA information services on the belief that such services do not fall within the definition of "interLATA services" and that, therefore, the in-region/out-of-region dichotomy of Section 271 is inapplicable to interLATA information services.[46] The contrary is true, however, because interLATA information services do indeed fall within the definition of "interLATA service."

1. First Amendment Concerns Regarding Regulation of Information Services

At the outset, BellSouth notes that information services are content-related services, and accordingly such services are commercial speech entitled to First Amendment protections.[47] Accordingly, the Commission must not regulate information services in an overbroad manner. Requiring a separate affiliate for information services constitutes a form of prior restraint, and must be limited to the narrowest class of such services for which there is a compelling government need for the restraint.[48] The Commission must, therefore, construe the provisions of the 1996 Act respecting information services so as to impose no greater restrictions on the BOCs' First Amendment right to engage in commercial speech than is justified by "an important or substantial governmental interest."[49]

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46 *See NPRM* at ¶ 41 & n.80.

47 *See U S West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), *aff'd*, 48 F.3d 1092 (9th Cir. 1994); *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995), *vacated and remanded for consideration of mootness*, 116 S.Ct. 1036 (1996); *see also Pacific Telesis Group v. United States*, 48 F.3d 1106 (9th Cir. 1994), *pet. for cert. filed* (Aug. 23, 1995); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994).

48 *See, e.g., Century Communications Corp. v. FCC*, 835 F.2d 292, 298-99 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

49 *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

As noted above, the Commission tentatively interpreted Sections 271 and 272 as requiring the use of a separate affiliate for all interLATA information services, both in- and out-of-region. Assuming arguendo that there may be a legitimate government need to impose a separate subsidiary requirement to some degree, that need is nonexistent (or at least not "important or substantial") out-of-region. Thus, under the First Amendment, the Commission is powerless to impose a separate affiliate requirement for out-of-region information services.

2. Out-Of-Region InterLATA Information Services

The foregoing analysis is consistent with the statute, which clearly permits BOCs to provide interLATA services out-of-region without a separate affiliate, including both interLATA telecommunications services and interLATA information services. This is most immediately apparent from an examination of Sections 271(b) and (g). Section 271(b) describes how Section 271 applies to three classes of "interLATA services." One of those classes is "incidental interLATA services," indicating that Congress intended that "incidental interLATA services" are a subset of interLATA services. Section 271(g) defines the "incidental interLATA services" as the "interLATA provision" by a BOC of certain specified services, most of which are indisputably information services, when provided via telecommunications, and not telecommunications services.[50] If these information services, when provided on an interLATA basis, were not "interLATA services," there would have been no need for Congress to provide special treatment for them in Sections 271(b)(3)

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[50] Among the incidental interLATA services listed in § 271(g) that, when offered "via telecommunications," clearly constitute information services, and not telecommunications services, are: audio, video, and other programming services, interactive programming services, alarm monitoring services, two-way interactive video and Internet services to schools, and information storage and retrieval services. Of course, audio, video, and other programming services and interactive programming services, whether offered "via telecommunications" or by some other means such as a cable system or an open video system, fall within the definition of "incidental interLATA services" that are exempt from the in-region interLATA restriction and the separate affiliate requirement.

and (g). By exempting certain interLATA information services entirely from the separate affiliate requirement and subjecting others to the requirement only when provided in-region, Congress limited the statute's constraint on corporate speech.

The statute's definitions for the relevant terms confirm that certain information services provided on an interLATA basis are "interLATA services" and are, accordingly, subject to different treatment in- and out-of-region. The statute does not specifically define "interLATA information service" or "interLATA telecommunications service," but it does define "interLATA service," "telecommunications," "information service," and "telecommunications service." Specifically:

- "The term 'interLATA service' means telecommunications between a point located in a [LATA] and a point located outside such area."[51]
- "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[52]
- "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public . . . ."[53]
- "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[54]

It is noteworthy that the definition of "interLATA service" does not encompass "telecommunications *service*" but applies instead to "telecommunications" across LATA

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51 47 U.S.C. § 153(42).

52 47 U.S.C. § 153(48).

53 47 U.S.C. § 153(51).

54 47 U.S.C. § 153(41).

boundaries.[55] One of the essential elements of an "information service" is that it involves the manipulation of information "via telecommunications." Thus, an "interLATA information service" is an "information service" that also constitutes an "interLATA service" because it is provided via interLATA "telecommunications." By reading together the definitions of "interLATA service," "telecommunications," and "information service," the following definition of an "interLATA information service" results:

> The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via the transmission, between a point, specified by a user, located in a LATA and a point, also specified by the user, located outside such LATA, of information of the user's choosing, without change in the form or content of the information as sent and received.

Because, under this definition, interLATA information services clearly fall within the definition of interLATA services, the out-of-region provision of all such services is exempt from the separate affiliate requirement, pursuant to Sections 271(b)(2) and 272(a)(2)(B)(ii).

3. Incidental InterLATA Information Services

As noted above, several forms of interLATA services, which are "information services" when provided "via telecommunications," are deemed incidental interLATA services that may be provided both in- and out-of-region pursuant to Sections 271(b) and (g). These incidental interLATA services are, with the exception of information storage and retrieval service as defined in Section 271(g)(4), exempt from the separate affiliate requirement under Section 272(a)(2)(B)(i).[56]

Significantly, Section 271(g)(1)-(2) renders "incidental" the interLATA provision by a BOC of "audio programming, video programming, or other programming services to subscribers to such

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[55] The Commission erroneously states that the definition of "interLATA service" "refers to telecommunications service." *NPRM* at n.80. As is clear from the definition itself, it refers to "telecommunications."

[56] See preceding note.

services," as well as the "capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services." These provisions ensure, among other things, that BOCs do not need to utilize a Section 272 affiliate to provide services such as interactive or non-interactive cable and wireless cable television service, and may also offer "other programming services," such as internet access, to their cable subscribers.[57] Other "incidental interLATA services" that may be provided without a Section 272 separate affiliate include alarm monitoring services,[58] two-way, dedicated interactive video or Internet services to schools, and the transmission of certain signaling and network control information.[59] Moreover, the interLATA provision of information storage and retrieval service is permitted as an "incidental interLATA service" subject to a four-year separate affiliate requirement.[60]

The provisions of the 1996 Act differ significantly from the view tentatively espoused by the Commission, because the Act expressly authorizes the provision of interLATA information services and exempts some of them from the separate affiliate requirement. First, all out-of-region interLATA information services are flatly exempt. Second, all interLATA information services that qualify as "incidental interLATA services," except as noted above, are exempt both in and out of the BOC's region. Third, all interLATA services authorized by the MFJ court are subject only to the conditions, if any, imposed by the court.

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[57] "Other programming service" is defined, with reference to cable systems, in 47 U.S.C. § 522(14) as "information that a cable operator makes available to all subscribers generally." Congress intended that this would "include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services." Conference Report at 169.

[58] Non-preexisting alarm monitoring services are, however, subject to a five-year separate affiliate requirement under § 275.

[59] *See* § 271(g)(1)-(2), (4)-(6).

[60] Section 272(a)(2)(B)(i) exempts from the separate affiliate requirement all of the incidental interLATA services except information storage and retrieval.

Moreover, intraLATA information services, such as the telemessaging services offered in BellSouth's local exchange areas, are not subject to the separate affiliate requirement.[61] BellSouth does not provide them "via [interLATA] telecommunications" so they are not interLATA services. The mere fact that such services may potentially be accessed by the customer from another LATA by choosing to use an interexchange carrier's facilities to reach the service does not mean that the service is interLATA, as the Commission suggests in paragraph 44 of the *NPRM.* For an information service to be an interLATA service, the provider must include as a component thereof "telecommunications between a point located in a [LATA] and a point located outside such area."[62]

Inherent to the definitions contained in the 1996 Act is that any interLATA information service must involve interLATA transmission between points specified *by the user as part of that service.* Where interLATA transmission is provided *separate* from the information service, or where interLATA transmission is provided *outside the control of the user* solely to incorporate network efficiencies into service offerings, such services are clearly excluded from the definition of interLATA information services.

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61 While the Commission appears largely correct in its tentative conclusion that telemessaging is an information service, *NPRM* at ¶ 54, it is equally clear that intraLATA telemessaging is exempt from the separate affiliate requirement of § 272 both because it is intraLATA and it is a "previously authorized service." IntraLATA voice storage and retrieval services such as voice mail, and electronic mail, were authorized by the MFJ court. *See United States v. Western Electric Co.,* 714 F. Supp. 1, *clarified,* 690 F. Supp. 22 (D.D.C. 1988), *affirmed in relevant part,* 900 F.2d 883 (D.C. Cir.), *cert. denied,* 498 U.S. 911 (1990). Moreover, voice storage and retrieval are also exempt because the 1996 Act's separate affiliate requirements affect only interLATA services.

Under the 1996 Act, telemessaging service is defined as "voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services. 47 U.S.C. § 260(c). This largely parallels the MFJ court's 1988 ruling that the BOCs may engage in "voice storage and retrieval services, including voice messaging and electronic mail services," 714 F. Supp. at 23, and the Commission correctly notes that most such services have long been considered enhanced services, *NPRM* at ¶ 54 n.102.

62 47 U.S.C. § 153(42).

4. Conformance With Existing Policies

This result not only conforms better to the First Amendment than the proposal in the *NPRM*—it also conforms far better to the preexisting FCC policies concerning BOC provision of enhanced services than the Commission's tentative conclusion that virtually all such services with an interLATA component may be subject to a separate affiliate requirement. As noted in the *NPRM*, the Commission has, over the last decade, developed a variety of structural and nonstructural safeguards for the provision of enhanced services and information services by the BOCs, including the Computer II rules, CEI and ONA plans, and the nonstructural safeguards developed in Computer III.[63] Requiring a Section 272 separate affiliate for interLATA information services that can currently be offered pursuant to nonstructural safeguards would discard more than a decade's experience and would turn away from the Commission's long-standing conclusions that nonstructural safeguards are more beneficial to the public interest than structural separation.[64]

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63 *See NPRM* at ¶¶ 47-50.

64 *See Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7751-52 (1993); *Separation of Costs of Regulated Telephone Service for Costs on Nonregulated Activities*, 2 F.C.C.R. 1298 (1987), *recon.*, 2 F.C.C.R. 6283 (1987), *further recon.*, 3 F.C.C.R. 6701 (1988), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990); *see also Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer III")*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*"Phase I Order"*), *recon.*, 2 F.C.C.R. 3035 (1987) (*"Phase I Recon. Order"*), *further recon.*, 3 F.C.C.R. 1135 (1988) *("Phase I Further Recon. Order")*, *second further recon.*, 4 F.C.C.R. 5927 (1989) (*"Phase I Second Further Recon."*), *Phase I Order and Phase I Recon. Order vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*"California I"*); Phase II, 2 F.C.C.R. 3072 (1987) (*"Phase II Order"*), *recon.*, 3 F.C.C.R. 1150 (1988) (*"Phase II Recon. Order"*), *further recon.*, 4 F.C.C.R. 5927 (1989) *("Phase II Further Recon. Order")*, *Phase II Order, vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 F.C.C.R. 7719 (1990) (*"ONA Remand Order"*), *recon.*, 7 F.C.C.R. 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*"California II"*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 F.C.C.R. 7571 (1991) *("Computer III Remand")*; *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*"California III"*), *cert. denied*, 115 S.Ct. 1427 (1995).

In fact, the Section 272 separation requirements, as interpreted by the Commission, appear to be even more stringent than the *Computer II* structural separation rules that the Commission found to be unnecessary to safeguard the public interest.[65] In particular, under *Computer II,* the separate affiliate is required to have separate operating, marketing, installation, and maintenance personnel from the BOC, while all personnel of the Section 272 affiliate must be separate from the BOC.[66] Moreover, the Commission has proposed that the rules implementing Section 272 impose even more stringent separation requirements than the statute and going well beyond the *Computer II* rules, by proposing to prohibit all sharing of overhead and support functions, even though sharing of such functions is permissible under *Computer II.* (*NPRM* ¶ 62.) As discussed below in Section IV.B, this proposal is unnecessary and contrary to the statute.

There is no indication in the 1996 Act or its legislative history suggesting that Congress intended to supplant the entire existing system of nonstructural safeguards. Accordingly, the existing safeguards should remain in place for all BOC information services that are enhanced services,[67] other than electronic publishing,[68] and are (a) intraLATA; (b) out-of-region; (c) incidental

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65 *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) ("*Computer II Final Order*"), *recon.*, 84 FCC 2d 50 (1980) ("*Computer II Reconsideration Order*"), *further recon.*, 88 FCC 2d 512 (1981) ("*Computer II Further Reconsideration Order*"), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

66 *Compare* 47 C.F.R. § 64.702(c)(2) *with* 47 U.S.C. § 272(b)(3).

67 Although many activities classified as enhanced services are "essentially the equivalent of the 'information services'" described in the MFJ or the 1996 Act, as the Commission notes (*NPRM* at n.85), the respective origins of these two terms result in the scope of "information services" being broader than "enhanced services." For example, the statutory definition of telemessaging service includes "any *live operator services* used to record, transcribe, or relay messages." While such activities may well fall within the ambit of "information services" under the 1996 Act, as proposed by the Commission (*NPRM* at ¶ 54), such live operator activities are not "computer processing applications" and therefore are not enhanced services under the Computer II rules, 47 C.F.R. § 64.702.

68 Electronic publishing falls within the definition of information service, *see* 47 U.S.C. § 153, but is subject to different structural regulation by the 1996 Act, *see* 47 U.S.C. § 274.

(other than non-voice information storage and retrieval); or (d) previously authorized by the MFJ court.

BellSouth is currently engaged in the provision, on an integrated basis, of intraLATA information services that were previously authorized by the MFJ court in its 1988 decision, including voice storage and retrieval service (*e.g.,* voice mail). Requiring the use of a separate affiliate for any of these existing services would interfere with BellSouth's first amendment rights, cause it irreparable harm in a competitive environment, and cause serious disruptions of service for its customers.

IV. STRUCTURAL SEPARATION REQUIREMENTS OF SECTION 272 (*NPRM* ¶¶ 55-64)

Congress set forth in considerable detail what requirements are to be placed on the separate affiliate. Indeed, the structural separation requirements of Section 272(b) are comparable in their level of detail to the rules the FCC has previously adopted to govern Computer II or cellular structural affiliates.[69] The fact that Congress set forth such details instead of expressly leaving the details for the Commission to complete demonstrates that the structural separation requirements of Section 272(b) are complete unto themselves. By taking this action, Congress made clear its intent that the structural separation requirements are not to be supplemented through Commission rulemaking, other than to specify the manner of maintaining books, records, and accounts.[70] Unlike Section 273, which specifically confers authority on the Commission to supplement the statutory

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[69] *Compare* 47 U.S.C. § 727(b)(1)-(5) with 47 C.F.R. §§ 22.903 (b)-(g) (cellular), 64.702(c)(1)-(5) (Computer II).

[70] *See American Petroleum Institute v. EPA,* 52 F.3d at 1119-20; *Ethyl Corp. v. EPA,* 51 F.3d 1053, 1060-61. Both of these cases are discussed and quoted in the Introduction, *supra.*

structural separation scheme with additional structural regulations,[71] Section 272 does not give the Commission the ability to adopt substantive structural separation rules.[72]

Given this fact, the Commission has no authority to promulgate substantive legislative rules (other than accounting rules) to implement the structural separation requirements of Section 272(b). The Commission does not have the discretion, in "implementing" Section 272, to add to or deviate from the detailed statutory scheme established by Congress.[73] Thus, a given BOC affiliate either is in compliance with Section 272(b) or it is not. If it complies with Section 272(b), the affiliate satisfies the requirements of Section 272(a). Commission regulations cannot change the plain terms of the statute.

A. "Operate Independently" (*NPRM* ¶¶ 57-60)

Section 271(b)(1) requires the BOC affiliate to "operate independently" from the BOC. This language is identical to the language in the *Computer II* and cellular rules.[74] Accordingly, no rules are needed to explicate the meaning of this provision. Because Congress used identical language in these rules, it would be reasonable to interpret the language similarly in each case. It would not

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[71] Section 273(g) expressly grants the Commission authority to "prescribe such additional rules and regulations as the Commission determines are necessary to carry out the provisions of this section and otherwise to prevent discrimination and cross-subsidization" with respect to the manufacturing affiliate.

[72] Indeed, § 272(f)(3) specifically negates any Commission authority to adopt additional safeguards in implementing Section 272 when it states that the Commission may only prescribe its own safeguards "under any *other* section of this Act." (Emphasis added.)

[73] *See American Petroleum Institute,* 52 F.3d at 1119-20; *see also MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 114 S. Ct. 2223 (1994); *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1520 (D.C. Cir. 1995); *MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186, 1995 (D.C. Cir. 1985); *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (per curiam) (holding that an agency must adhere to the procedures established by Congress and is without authority "to replace the statutory scheme with a . . . procedure of its own invention").

[74] *See* 47 C.F.R. §§ 22.903(b) ("Separate corporations must operate independently in the provision of cellular service"), 64.702(c)(2) ("each such separate corporation shall operate independently in the furnishing of enhanced services and customer-premises equipment").

be reasonable, however, to interpret this language as a vehicle for adding in additional *Computer II* (or other) separation requirements, as the Commission suggests.[75]

The Commission notes that in Section 274(b) Congress similarly imposed an "operate independently" requirement on electronic publishing affiliates, but then went on to restrict particular activities; the Commission seeks comment on the relevance of this.[76] BellSouth submits that the fact that Congress found it necessary to impose restrictions on particular activities in Section 274 indicates that those activities were not already covered by the "operate independently" requirement. The absence of those same activities from the listing of specific restrictions in Section 272, therefore, indicates that those activities are not restricted in the case of the Section 272 affiliate, under the doctrine of *inclusio unius est exclusio alterius.* Accordingly, those activities specifically restricted for a Section 274 affiliate that are not listed in Section 272(b) must be considered permissible for the Section 272 affiliate. Thus, it is permissible for the Section 272 affiliate, among other things, to own property commonly with the BOC; use the BOC's name, trademarks, and service marks in marketing the affiliate's products and services; use the BOC to perform hiring and training of personnel; use the BOC to perform purchasing, installation, and maintenance; and use the BOC to perform research and development.[77]

B. "Separate Officers, Directors, and Employees" (*NPRM* ¶ 62)

The Commission tentatively concludes that Section 272(b)(3), which requires the affiliate to have "separate officers, directors, and employees" from the BOC, prohibits all sharing of in-house operating, installation, and maintenance personnel, as well as administrative services such as

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75 *See NPRM* at ¶ 59.

76 *See NPRM* at ¶ 60.

77 *See* § 274(b)(5)-(7).

accounting, auditing, legal, personnel, management, finance, tax, insurance and pension.[78] The Commission also seeks comment on sharing of outside services and other types of personnel sharing.

BellSouth submits that the statute's language is clear: the affiliate must have separate officers, directors, and employees from the BOC. That means that no officer, director, or employee of the affiliate may also be an officer, director, or employee, respectively, of the BOC; it means nothing more than that. The section is silent about sharing of services, indicating that sharing of services, or contracting for such services to be rendered by the BOC for the affiliate, is fully permissible, provided that no employee of one entity is an employee of the other.[79] The section also places no restrictions on the separate affiliate's ability to use the services of a common parent company or an outside firm—services that may also be used by the BOC. By not expressly restricting such activities, the statute establishes a presumption that they are permissible.[80]

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[78] *See NPRM* at ¶ 62.

[79] In Section 274, which also prohibits common employees for the BOC and its electronic publishing affiliate, Congress found it necessary to include an express restriction on the BOC engaging in purchasing, installation, maintenance, hiring, training, research, and development for the subsidiary. This indicates that such services are not encompassed by the separate employee provision.

[80] Indeed, the common use of the parent company's services by the BOC and the separate affiliate is probably unavoidable, given that the parent company has responsibility for preparation of annual and quarterly reports with the SEC, FCC, and other agencies, filing tax returns, complying with EEO laws, and other activities on a consolidated basis on behalf of itself and its subsidiaries, and is also responsible to regulators for exercising control over the affairs of its subsidiaries.

V. NONDISCRIMINATION SAFEGUARDS (*NPRM* ¶¶ 65-89)

A. "Discrimination" as Used in § 272(c)(1) (*NPRM* ¶ 72)

In paragraph 72 of the *NPRM,* the Commission tentatively concludes that the use of the term "discriminate" in 272(c)(1) includes only unjust or unreasonable discrimination. BellSouth agrees with this tentative conclusion. The Commission has long recognized that the prohibitions on discrimination in the Communications Act extend only to discrimination that is not justifiable. A blanket prohibition on all "discrimination", even when clearly justified by differences in costs or other circumstances, would be extremely anti-competitive. If BOCs are not permitted to distinguish between companies that are not similarly situated they will not be able to do business efficiently. Section 272(c)(1) prohibits the BOC from discriminating between its Section 272 affiliate and other companies with respect to the provisioning and procurement of goods, services, facilities, and information, and the establishment of standards. Clearly, this cannot be read to require the BOC to treat its affiliate exactly like another company with different capabilities or requirements, or with a different credit history, or with different capacity requirements.

The notion of "discrimination" inherently requires that two companies must be similarly situated before they must be treated identically, as the Commission has long recognized. Had Congress intended such a fundamental change in regulatory law, there would certainly have been discussion of the change in the legislative history. The absence of such discussion should lead the Commission to conclude that no such change was intended by Congress.[81]

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[81] While the Commission reached a contrary conclusion with respect to Section 251's use of the term "nondiscriminatory" in its *Interconnection Order,* the Commission there indicated that its rejection of the historical interpretation of the term "nondiscriminatory" was limited to Section 251. *Interconnection Order* at ¶ 218. Thus, that interpretation has no bearing on the interpretation of similar language in Section 272(c)(1).

BellSouth notes, in this connection, that the prohibition on discrimination contained in Section 272(c)(1) does *not* apply with respect to joint marketing activities authorized by Section 272(g). Section 272(g)(3) specifically provides that "[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c)." Accordingly, a BOC that sells or markets its affiliate's interLATA service jointly with its local exchange service is under no obligation to perform similar sale or marketing activities on behalf of other interLATA carriers.

Section 272(g)(3) is significant, because it reflects Congressional recognition that the BOC will, as part of its joint marketing efforts, engage in a variety of activities on behalf of its interLATA affiliate that it will not be required to replicate for others. For example, as part of its joint marketing of interLATA and local exchange service, a BOC may acquire customers, provide integrated billing, provide customer care, and provide a single point of contact for maintenance and repair service. Section 272(g)(3) makes clear that the BOC is under no obligation to provide these services for other interLATA carriers merely because it does so on behalf of its interLATA affiliate as part of the joint marketing program.

B. BOC InterLATA Affiliate's Joint Marketing of Local Exchange Service Does Not Make It an Incumbent LEC (*NPRM* ¶ 79)

In paragraph 79 of the *NPRM,* the Commission seeks comment on whether a BOC affiliate that provides local exchange service should be considered an incumbent LEC subject to the requirements of Section 272(c). While BellSouth agrees that if a BOC moves its local exchange operations to an affiliate outright, that affiliate becomes a "successor or assign" of the BOC providing local exchange service and therefore would be subject to Section 272(c), BellSouth wishes to distinguish that situation from joint marketing by the Section 272 interLATA affiliate. If the BOC does not "move" its local exchange operations to an affiliate and continues, itself, to provide local

exchange service, the mere fact that an affiliate sells or markets the BOC's local exchange service under the joint marketing provisions of the statute does not make that affiliate a "successor or assign" of the BOC and does not make that affiliate an incumbent LEC. Accordingly, a BOC Section 272 affiliate that engages in joint marketing of the BOC's local exchange service together with its own interLATA service is not an affiliate subject to Section 251(c) and does not become subject to the requirements of Section 272(c).

VI. ENFORCEMENT OF SECTIONS 271 AND 272 (*NPRM* ¶¶ 94-107)

In the *NPRM,* the Commission seeks comment on a number of issues relating to how Sections 271 and 272 should be enforced after a BOC's Section 271 application for interLATA entry has been approved. Herein, BellSouth addresses several of these issues.

A. Use of Section 271(d)(6)(A) Complaint Proceedings in Response to Complaint or on Commission's Own Motion

BellSouth agrees with the Commission that it may determine whether a BOC continues to be in compliance with the requirements of these statutory provisions through a Section 271(d)(6)(A) complaint proceeding, either in response to a Section 271(d)(6)(B) complaint or on its own motion.[82] Section 403 gives the Commission authority to proceed on its own motion "as though it had been appealed to by complaint or petition under any of the provisions of this Act."[83] This means that if the Commission proceeds on its own motion, it must afford the BOC the same procedural protections that would apply in the event a complaint was filed. Accordingly, before the Commission may make the determination that a BOC has ceased to comply, it must give the BOC notice of the *prima facie* evidence that the BOC has ceased to comply, which would otherwise be contained in a complaint, and give the BOC a reasonable opportunity to rebut such evidence.

B. Burden of Proof

The Commission has also sought comment on whether the burden of proof should be shifted to the BOC concerning whether it is in compliance, either after a *prima facie* showing has been made of noncompliance or at some other stage.[84] The Commission bases this proposal in part on an analogy to Section 202(a), where, after a complainant satisfies its burden of proving discrimination,

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82 *See NPRM* at ¶ 98.

83 47 U.S.C. § 403.

84 *See NPRM* at ¶ 102.

the burden shifts to the defendant to prove that such discrimination is just or reasonable. The Commission also proposes to shift the burden in order "to assist parties in their pursuit of complaints."[85] For the reasons that follow, BellSouth submits that the proposal to shift the burden of proof is unlawful, except as to the reasonableness of discrimination.

The Administrative Procedure Act ("APA") provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[86] Under this principle of law, a party seeking the denial or revocation of a BOC's authorization to engage in interLATA service has the burden of proving that the BOC has failed to continue complying with the statutory criteria. Absent a statutory exception, the Commission does not have authority to shift the burden of proof. There is no such exception here.

Under Section 202(a), the Commission has traditionally shifted the burden of proof to the defendant to demonstrate the reasonableness of its action when the complainant has satisfied its burden of proving that discrimination occurred. This is because the assertion of reasonableness is considered an affirmative defense.[87] In other words, discrimination, once proven, is presumed to be a violation of Section 202(a) unless the defendant chooses to assert a justification for it. Justification becomes an issue only if asserted by the defendant and, accordingly, the defendant has the burden of proving it. As a result, the complainant is not required to negate all possible justifications for such discrimination in its affirmative case.

In proceedings involving complaints (or assertions on the Commission's own motion) that a BOC has failed to continue complying with the statutory criteria for interLATA eligibility, the

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85 *NPRM* at ¶ 101.

86 5 U.S.C. § 556(d).

87 *See, e.g., AT&T Communications, Inc. (Holiday Rate Plan)*, 5 F.C.C.R. 1821, 1821 (1990), *reconsidering* 4 F.C.C.R. 7933, 7934 (1989).

burden should shift to the BOC only where the BOC similarly asserts an affirmative defense, such as competitive necessity or the reasonableness of discrimination. In the absence of a new issue raised as an affirmative defense by the BOC, the proponent of an order revoking the BOC's authority to engage in interLATA service must carry the burden of proof.

Once the proponent of such an order makes out a *prima facie* case, the burden remains on the proponent to prove its case.[88] It would violate the APA and fundamental notions of due process to place the burden on the BOC to re-prove its compliance with the statutory interLATA entry criteria every time a complaint is entertained. More importantly, it would violate the considered judgment of Congress. Congress required the BOCs to prove their compliance with the competitive checklist once, and once only. The "competitive checklist" is an *entry* threshold. Once a BOC has met the threshold, it is entitled to be a player in the competitive interLATA industry within its region. Congress did not require BOCs to continually prove a negative thereafter as a condition of being in the interLATA business.

Not only would the Commission be acting contrary to the judgment of Congress if it placed the burden of proof on the BOCs in revocation cases—this would also constitute poor public policy.

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[88] This issue was clarified in 1994, when the Supreme Court overruled the prior interpretation that Section 7(c) of the APA, which provides that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof," 5 U.S.C. § 556(d), determines only the burden of going forward, not the burden of persuasion. Specifically, in *Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S. Ct. 2251, 2258 (1994), the Court held that Section 7(c) does, indeed, determine the "burden of persuasion," and thus requires that burden remain at all times with the proponent of the rule or order. *See Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1339-40 (D.C. Cir. 1995); *see also Brosnan v. Brosnan*, 263 U.S. 345, 349 (1923) (holding that the imposition of burden of proof imposes the burden of persuasion, not simply the burden of establishing a *prima facie* case). The Court interpreted Congress' use of the term "burden of proof" in light of the meaning generally accepted in the legal community at the time Section 7(c) was enacted. *See generally* J. McKelvey, Evidence 64 (4th ed. 1932) ("The proper meaning of [burden of proof]" is "the duty of the person alleging the case to prove it," rather than "the duty of the one party or the other to introduce evidence"). The Court, did, however, note that the burden to mount an affirmative defense could rest on the party opposing the order. 114 S. Ct. at 2258.

Once a BOC is authorized to engage in the provision of interLATA service, the focus should be on promoting competition in interLATA service. That is why Congress made the decision to allow the BOCs to enter the field, after all. If, after such entry, the BOCs were forced to continually prove to regulators that they are not violating the local competition requirements, they will have to devote substantial resources to bureaucratic battles—resources that should instead be devoted to making the long-distance market more competitive. Moreover, encouraging such litigation will work to the detriment of consumers, both because of the substantial cost of engaging in these regulatory proceedings and because of the diminished long-distance competition that would result.

C. Rebuttable Presumption of Lawfulness

The Commission's proposal not to employ a rebuttable presumption of lawfulness in favor of the BOC in proceedings wherein a complainant alleges that a BOC no longer meets the statutory criteria for in-region interLATA eligibility[89] is equally unlawful. The Commission's analogy to a complaint concerning a dominant carrier's tariffed rates misses the mark. A dominant carrier's rates go into effect without any Commission approval. There is, accordingly, no outstanding determination of those rates' lawfulness when they are called into issue in a complaint proceeding. However, a BOC may provide in-region interLATA service only after an affirmative Commission finding that the BOC has satisfied extensive statutory standards. After such an affirmative finding, the BOC's eligibility has been established as a matter of law, and the BOC is entitled to rely on that determination. A complaining party, accordingly, must overcome the Commission's determination that the BOC is eligible by proving that the BOC is no longer eligible.

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89 *See NPRM* at ¶ 104.

VII. CLASSIFICATION OF LECS AND THEIR AFFILIATES AS NON-DOMINANT CARRIERS (*NPRM* ¶¶ 108-152)

The Commission has also requested comment on whether to relax the dominant carrier classification that under the Commission's current rules would apply to the provision of in-region, interstate, domestic interLATA services provided by the BOCs' interLATA affiliates.[90] In general, dominant carriers, which by definition possess market power, are subject to more stringent tariff filing and facilities authorization requirements than non-dominant carriers, which lack market power.[91] BellSouth submits that because the BOCs and their affiliates lack, or are restrained in their ability to exercise, market power in the relevant product and geographic markets, BOC affiliates should be regulated as non-dominant carriers. This same non-dominant carrier classification should be applied to the BOC affiliates' provision of in-region, international services.

In the *NPRM*, the Commission noted that it has previously addressed the possibility of BOC entry into interstate, interLATA services in terms of what would be necessary for BOCs and their affiliates to be classified as non-dominant:

> "The BOCs currently are barred by the [MFJ] from providing interLATA services . . . . If this bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for non-dominant regulation."[92]

The 1996 Act has now superseded the MFJ's prohibition against the BOCs' provision of interLATA services, and has answered the question of what degree of separation is necessary for BOC non-dominant regulation. Specifically, the 1996 Act imposed non-accounting separate affiliate and

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90 *NPRM* at ¶ 108.

91 *See* 47 C.F.R. § 61.3(o), (t); *NPRM* at ¶ 109.

92 *NPRM* at ¶ 112 (*quoting Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket 79-252, *Fifth Report and Order*, 98 FCC 2d 1191, 1198 n.23 (1984) (subsequent history omitted)).

nondiscrimination safeguards, discussed *infra*, on BOCs in order to provide interLATA telecommunications services originating in states in which they provide local exchange and exchange access services. BellSouth submits that these statutory safeguards, in connection with other existing regulatory restraints and existing substantial competition within the relevant market, provide the protection necessary to classify the BOCs as non-dominant in the provision of in-region, interstate, domestic interLATA services.

A. The Commission Should Retain its *Competitive Carrier* Definition of the Relevant Market (*NPRM* ¶¶ 115-129)

In order to assess whether a carrier possesses market power, the relevant product and geographic markets must be defined.[93] The Commission recently sought comment on these definitions in its *Interexchange NPRM* in CC Docket No. 96-61.[94] BellSouth reiterates herein its position in response to the *Interexchange NPRM* that the Commission should retain its relevant product and geographic market definitions adopted in the *Competitive Carrier Proceeding*.[95] There

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93 *NPRM* at ¶ 114.

94 *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934,* CC Docket 96-61, *Notice of Proposed Rulemaking*, FCC 96-123 (released March 25, 1996) (*Interexchange NPRM*). In this proceeding the Commission seeks comment on how the market definition approaches proposed in the *Interexchange NPRM* should be applied or, if they are not adopted, how the relevant market definitions should be defined for purposes of this proceeding. *NPRM* at ¶ 115.

95 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, *Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 308 (1979) (*Competitive Carrier NPRM*); *First Report and Order*, 85 FCC 2d 1 (1980); *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981) (*Competitive Carrier Further NPRM*); *Second Further Notice of Proposed Rulemaking*, FCC 82-187, 47 Fed. Reg. 17,308 (1982); *Second Report and Order*, 91 FCC 2d 59 (1982); *Order on Reconsideration*, 93 FCC 2d 54 (1983); *Third Further Notice of Proposed Rulemaking*, 48 Fed. Reg. 28,292 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 FCC 2d 554, 563 (1983), *vacated in AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); *Fourth Further Notice of Proposed Rulemaking*, 96 FCC 2d 1191 (1984); *Fifth Report and Order*, 98 FCC 2d 1191 (1984); *Sixth Report and Order*, 99 FCC 2d 1020 (1985), *vacated in MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively the *Competitive Carrier Proceeding*).

the Commission concluded that the relevant product market for purposes of assessing market power of domestic interexchange carriers is "all interstate, domestic, interexchange telecommunications services" with no relevant submarkets, and that there is a "single relevant geographic market" with no relevant submarkets.[96] Like BellSouth, AT&T and other commenting parties addressing the issue in response to the *Interexchange NPRM* agreed that the Commission's existing relevant market definition is correct and that the interexchange market is properly defined as a single national market.[97]

1. Relevant Product Market (*NPRM* ¶¶ 116-121)

In the *Interexchange NPRM*, the Commission proposed to narrow the relevant product market definition to encompass only "an interstate, interexchange service for which there are no close substitutes or group of services that are close substitutes for each other but for which there are no other close substitutes."[98] Nevertheless, it acknowledged that it would be impractical to define all relevant product markets for interstate, domestic, interexchange services, and that "substantial competition exists with respect to most interstate, domestic, interexchange service offerings."[99] In this regard, BellSouth agrees with the Commission that there is no "evidence suggesting that there is a particular interLATA service or group of services that is or will be provided by the BOC affiliates . . . with respect to which 'there is or could be a lack of competitive performance.'"[100]

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96 *Competitive Carrier Proceeding, Fourth Report and Order*, 95 FCC 2d at 563, 574-75.

97 *See* Phase I Comments in CC Docket No. 96-61 of AT&T at 5; Ameritech at 13; Bell Atlantic at 5; Florida Public Service Commission at 6-9; NYNEX Comments at 5-7; Pacific Telesis Group at 4-8; SBC Communications, Inc. at 2-5; U S West at 2-3; United States Telephone Association at 13.

98 *Interexchange NPRM* at ¶ 41.

99 *NPRM* at ¶ 119.

100 *NPRM* at ¶ 119.

Applying the approach proposed in the *Interexchange NPRM,* the Commission concludes the relevant product market for purposes of assessing whether BOC affiliates have market power in the provision of interstate, domestic, interLATA services should be "all interstate, domestic, interLATA telecommunications services."[101] The Commission now invites comment on this conclusion and its proposed approach to the product market definition issue, and requests alternative approaches.[102]

BellSouth agrees with the Commission that the relevant product market should be all interstate, domestic, interLATA telecommunications services. This is the same relevant product market adopted in the *Competitive Carrier Proceeding*,[103] and is consistent with the position of BellSouth in response to the *Interexchange NPRM.*[104] Nevertheless, BellSouth disagrees with the *approach* used to reach the stated result outlined above, and, as it established in the *Interexchange* proceeding, believes there is no basis for judging the BOCs under a different standard for purposes of assessing dominance and determining the relevant market than that previously applied to AT&T and other competitors in reclassifying them as non-dominant.[105]

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101 *NPRM* at ¶ 119.

102 *NPRM* at ¶¶ 118 n.220, 120.

103 The *Fourth Report and Order* in the *Competitive Carrier Proceeding* defined the relevant product market as all interstate, domestic, *interexchange* telecommunications services, as compared to the instant proceeding which proposes to define the relevant product market as all interstate, domestic, *interLATA* telecommunications services. However, the Commission has stated that these terms are equivalent. *See NPRM* at n.207 ("We use the term 'interLATA services' to refer to the interexchange services provided by BOC affiliates, because that is the term used by the 1996 Act.")

104 *See* BellSouth Comments (Phase I) in CC Docket No. 96-61 at 9-15. BellSouth requests that its comments in CC Docket No. 96-61 pertaining to the relevant market definition for purposes of assessing dominance be incorporated by reference into the record of the instant proceeding.

105 *Id.* at 10. In the *AT&T Non-Dominance Order*, which reclassified AT&T as a non-dominant carrier, the Commission noted that its existing relevant market definition had been used in classifying all of AT&T's competitors as non-dominant carriers, and concluded "We see no basis for determining whether AT&T is non-dominant under a different standard than that used for classifying its competitors." *AT&T Non-Dominance Order*, 1 Com. Reg. (P & F) 63, 72 (1995).

BellSouth showed in its *Interexchange* comments that the Commission's primary ground for revising its approach to defining the relevant product market — the existence of market power over certain discrete fringe services, but not the interstate, domestic, interexchange market as a whole — does not warrant redefinition of the relevant product market.[106] Specifically, in the case of AT&T, the Commission concluded some six months ago, that AT&T's control of two discrete services was "so small and insignificant relative to the overall interstate, domestic, interexchange market . . . as to be *de minimis*."[107] Thus, the Commission concluded that a carrier will be deemed non-dominant if it lacks market power in the interstate, domestic, interexchange market as a whole, even if it is able to control the price of some discrete fringe services within the overall market. The Commission gave no reasoned basis in its *Interexchange NPRM*, and gives no reasoned basis now, as to why its recent conclusion now merits revision. As previously shown by BellSouth, if there was no need to redefine the market for consideration of whether AT&T, the largest IXC, was dominant, there is no need to reconsider the market definition for considering the competitive effects of BOC entry.

Moreover, the Commission seems to justify its proposed approach to defining the relevant product market on the basis of service distinctions, even though it previously concluded that "defining each interexchange service as a separate relevant product market would result in relevant markets that are too narrow."[108] In fact, the Commission's proposed approach seems to signal a return to its "all-services" methodology of assessing dominance, under which a carrier was deemed dominant if it held market power in *any* market.[109] As BellSouth demonstrated in the *BOC Out-of-Region Proceeding*, this "all-services" approach to dominance was expressly rejected by the

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106 BellSouth Comments (Phase I) in CC Docket No. 96-61 at 12-15.

107 *AT&T Non-Dominance Order,* 1 Com. Reg. (P & F) at 92-93.

108 *See Interexchange NPRM* at ¶ 46.

109 See BellSouth Comments in CC Docket No. 96-21 at 5-9.